Supreme Court, U.S.
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No. 92-1810

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC.,
Petitioners,

v.

ALLARD & FISH, P.C., a Michigan professional corporation; DAVID W. ALLARD, JR.; DEBORAH L. FISH,
Jointly and Severally,
Respondents

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

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REPLY TO COUNTER STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE CREDITORS ARE PARTIES TO THIS ACTION AND WHETHER STOCKLER REPRESENTS THEM OR HAS STANDING TO PURSUE A PETITION ON THEIR BEHALF?

II.

WHETHER THE CONSTITUTIONAL ISSUES PRESENTED TO THIS COURT ARE PROPERLY BEFORE THIS COURT?

III.

WHETHER THIS PETITION SHOULD BE GRANTED WHEN PETITIONER ILLUSTRATES REASON JUSTIFYING A WRIT OF CERTIORARI?

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**United States of America
for the use of Otis Kirkland
and Micro Time Management
Systems, Inc. v Fidelity and
Deposit Company of Maryland**
Case No. 89-0600-R (R.1, P. 25-26) ... 6, 7

FEDERAL LAW

11 U.S.C.§1121(A)(B) 2

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OPINIONS BELOW

Petitioners rely on its previously submitted opinions as detailed therein. Respondents' "dissatisfaction" is irrelevant, illogical and has no merit since all of the opinions as detailed in Petitioner's Writ of Certiorari were not only addressed on appeal, but further, part of the joint appendix filed in this matter. (For example, see Joint Appendix, R.41, pages 50 to 67 -- for Memorandum Opinion and Order entered in the Chapter 11 bankruptcy proceeding relative to Micro-Time Management Systems, Inc. by the United States District Court Eastern District of Michigan, Bankrupcty Court, attached to Petitioners Writ of Certiorari as Appendix C.) Accordingly, Respondents allegation that the memorandum opinion and order from the Honorable Steven Rhodes of the United States District Court Eastern District of Michigan, Bankruptcy

Court was never a subject of this appeal is erroneous.

STATEMENT OF JURISDICTION

Since Respondent does not address Statement of Jurisdiction section within Petitioner's Writ of Certiorari, no reply is necessary or required.

CONSTITUTIONAL PROVISIONS INVOLVED

Once again, Respondents assert that they are "dissatisfied" with the presentation of the constitutional provisions involved as set forth in Petitioner's Writ of Certiorari. However, the constitutional provisions involved as provided for in Petitioner's Writ of Certiorari were presented to the Sixth Circuit Court of Appeals and are properly before this court. Additionally, as a result of the Court of Appeals for the Sixth Circuit unilaterally consolidating as one appeal cases 91-2260 and 91-2261, the Court of Appeals for the Sixth Circuit has violated the creditors due process of law whereby the creditors are left without counsel, without a remedy, and without this appeal without due process and equal protection of law.

I.
REPLY TO COUNTER STATEMENT OF THE CASE

Respondents' counter-statement of the case not only intentionally contains errors and omissions but further consists of misrepresentations and inaccuracies, forcing this reply. Pursuant to the Respondents, that they are the only ones who know all of the "facts". However, as the records, pleadings and transcripts of this matter illustrates, Respondents continue to fabricate and twist the "facts" so as to not give this Honorable Court a fair presentation of this case.[1]

Respondents assert that the Creditors of Micro Time Management Systems, Inc. (hereinafter "MTMS") are not now, and have never been parties to this "independent

[1] For example, Respondents state in their brief that "Stockler then attempted to file a late motion for reconsideration (R47) which was denied..."[p.8 - Respondent's Brief]. In actuality, (R.47) is an Exparte Motion to extend time to file a Motion for Reconsideration. Petitioners never filed a Motion for Reconsideration except before the Court of Appeals for the Sixth Circuit.

adversary proceeding". Additionally, Respondents assert that MTMS and Otis Kirkland are pursuing their own Writ of Certiorari on behalf of all other creditors.

However, this is not true. Attached hereto as Appendix A is a letter dated April 15, 1992 from Lynn Shector stating that she did not represent the creditors but merely MTMS and Otis Kirkland only.

Additionally, the creditors of MTMS' claim against the respondents herein is independent and distinct from MTMS' claim and does not belong and was not part of MTMS' plan of reorganization. As 11 U.S.C. §1121(A)(B) provides, only the debtor may file a plan of reorganization. It was only MTMS that filed a plan of reorganization, not the creditors. The creditors were not seeking to reorganize MTMS' business and

were thus not provided for in MTMS' plan of reorganization.[2]

Additionally, the Honorable George LaPlata of the United States District Court, Eastern District of Michigan, wrote an opinion predicated upon a bankruptcy appeal arising out of Allard & Fish's displeasure with an award of attorney fees stated in his "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court," that Respondents herein had a duty to the creditors separate and distinct from their duties to the trustee. Accordingly, this suit was brought on behalf of the creditors.

As previously indicated by Petitioner's Writ of Certiorari, attorney Lawrence J.

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[2] Respondents never raised as an affirmative defense that the creditors are not parties in interest, let along parties to this lawsuit. Pursuant to FRCP 12(h), this defense is waived. Furthermore, the entitlement acknowledges the Creditors of MTMS as a party to these proceedings. The courts have acknowledged the Creditors of MTMS as parties to these proceedings since they continue to send notice and other court documents to the Creditors of MTMS.

Stockler only withdrew from presenting MTMS and Kirkland, individually. The order submitted with the motion to withdraw expressly states that "It is hereby further ordered that Lawrence J. Stockler shall continue to represent the creditors of the estate of Micro Time Management Systems, Inc." (R. 48, p. 11-12). No objections were ever filed by Respondents to that motion or to the submitted order. No court ever ruled upon dismissing the pleadings filed by the Creditors, except the Court of Appeals. Stockler is a creditor, is a member of the creditors committee and is the attorney for the creditors in this matter. An attorney who appears for a party in pending litigation is always presumed to have authority to do so until the contrary is shown. See Drew v Burley, 287 F 916 (DC Or. 1920). There is a presumption that an attorney is authorized to appear and the

burden rests on the party on whose proported behalf the attorney appeared to show to the satisfaction of the court that no authority existed. See Aaron v United States, 155 F 833 (CA Mo. 1907). The Creditors of MTMS are parties to this proceeding and are entitled to their day in court.

Respondents next assert that Petitioner concedes all the relevant facts as set forth in the Court of Appeal's Opinion. HOWEVER, THIS IS NOT TRUE.

For example, the Court of Appeal's finding that Stockler was no longer representing any plaintiff or appellant in the case (Court's Opinion, Petitioner's Writ of Certiorari, Appendix B, page 2, footnote 1) is clearly erroneous. Lawrence J. Stockler is a creditor, is a member of the creditors committee, is the attorney with the creditors' approval. Stockler sent out notices to all of the creditors regarding

representation in the Allard & Fish lawsuit (R.54), and had affirmative responses back from creditors. Attached hereto as Appendix B is an order appointing unsecured creditors committee entered by the Honorable Steven W. Rhodes on March 16, 1988 listing those that have consented to be members of the unsecured creditors committee. As a result, the creditors of MTMS have the right to pick their own attorney which has nothing to do with Otis Kirkland or MTMS.

Additionally, the Court of Appeal's finding that attorney Arnold Schafer, previous attorney for MTMS, told Bohl that the relationship between Bohl and Comerica did not represent a conflict of interest is untrue, the same being determined by a jury ruling in favor of MTMS and against Bohl in the lawsuit United States of America for the use of Otis Kirkland and Micro Time Management Systems, Inc. v Fidelity and

Deposit Company of Maryland, Case No. 89-0600-R (R.1, P. 25-26). Additionally, the lower court's finding that Bohl did not discuss the issue of a conflict with Comerica with Respondents herein was erroneous, Bohl giving two separate stories at trial.

The lower court's finding that at the October 11, 1988 hearing in bankruptcy court before Judge Steven Rhodes that the court handed out copies of the Kirkland letter dated October 6, 1988 to all parties is an error. Specifically, there never was an attorney for the creditors committee present as there was NEVER any attorney for the Creditor's Committee. This was to keep costs down. Those that were present were only Comerica's counsel, Allard & Fish, and Schafer & Weiner (MTMS's attorney). Neither Stockler, Joseph Toronto, David Riccitelli, or John Cafiero, were present (Appendix B).

At the very least, who had knowledge of the conflict between Bohl & Comerica would be a question of fact for a jury to make the determination thereof, or even an advisory jury pursuant to FRCP 39(c). Additionally, the attorney for Roaring Springs was not the attorney for the creditors committee nor a member of the creditors committee nor present at the settlement conference of October 11, 1988. Even if he was, this was not notice to the creditors. The unsecured creditors committee had no knowledge whatsoever of the conflict between Bohl and Comerica until the trial against Bohl when Allard & Fish both testified (July, 1990).

Furthermore, what information or notice Kirkland may have had, the creditors and the creditors committee did not have such information, and so the creditors were hardly in a position to make a claim before they knew of the trustees conflict of

interest, before Judge Rhodes held on August 14, 1990 that Allard & Fish had breached their duties. (R.6, p. 27-35) In particular, Respondents breached their duties to the estate and to the creditors by failing to investigate the conflict and failing to review with Bohl as trustee, in a concrete and real and substantial way, Mr. Bohl's duties as a Chapter 11 trustee.

Respondents continue to assert that "the creditors" of MTMS have never been parties to this action either individually or collectively.[3]

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[3] In Respondent's Brief, page 6, Respondent state that "neither Stockler, any party to this action, nor the Court, ever took any steps to actually include any creditor as a party to this action. Otis Kirkland was the principal of the debtor, its sole shareholder and subordinated creditor with a status equivalent to an equity holder to be paid dividends only if all other creditors were paid in full. No class action procedure, or any other procedure was implemented to include any individual creditor to group or class of creditors." However, the creditors through their attorney Stockler always continued to receive documents, notice and pleadings from the courts, and Petitioners continued to file pleadings and other documentations with the courts, contrary to Respondents position. Additionally, not only was a class action not required pursuant to FRCP 23, but

However, respondents argument and allegations are untrue and are not consistent with the record and documents that have been filed in these proceedings. This action was commenced by the creditors, through Stockler, as a creditor and a member of the creditors committee, on January 8, 1991 against Allard & Fish in the United Stated Bankruptcy Court for the Eastern District of Michigan (R.1) (which was removed to the United District Court for the Eastern District of Michigan) as a result of the legal malpractice by the Respondent's herein. THE CREDITORS LOSSES AMOUNTING TO SEVERAL MILLIONS OF DOLLARS. MTMS and Otis Kirkland, asked to be included as plaintiffs in this lawsuit. Stockler, as a creditor, agreed but made it clear in the complaint that was filed on January 8, 1991 that the

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further, Respondents raise this issue for the first time on appeal.

damages of the creditors and the debtor were separate from one another. SPECIFICALLY, THE RELIEF CLAUSE OF THE COMPLAINT REQUESTS "THAT THIS COURT APPORTION SUCH RELIEF GRANTED BETWEEN THE DEBTOR AND ALL OF THE CREDITORS." (R.1, p. 13-14). Kirkland signed the complaint twice, once as president of MTMS and once individually "and on behalf of all other creditors." On or about April 3, 1991, the creditor's attorney Stockler moved to withdraw as to MTMS and Kirkland only. (R. 14) The motion was granted by Judge LaPlata on May 23, 1991. Although Stockler was no longer Kirkland or MTMS's counsel, Stockler was still a member of the creditors of MTMS as detailed in appeal No. 91-2260, as well as the attorney for the creditors of MTMS. (R. 54)

Moreover, as previously indicated in Petitioner's Writ, pertaining to Stockler's motion to reopen the bankruptcy case on

November 14, 1990, the Bankruptcy Court found that it was not necessary to reopen the case **SINCE THE CASE WAS NEVER CLOSED. THERE WAS NO FINDING WHATSOEVER THE UNSECURED CREDITORS HAD NO STANDING TO PURSUE AN ACTION FOR LEGAL MALPRACTICE.**

Additionally, Petitioner would refer Respondents to Notice of Taking Appeal filed October 25, 1991 (R.54) where a Notice of Taking Appeal was filed by the creditors of MTMS.

II.
INACCURACIES IN RESPONDENT'S BRIEF

Respondents Brief addresses three issues, alleging that Petitioner's Writ of Certiorari fails to meet certain "thresholds". The issues are:

a. Whether Stockler and/or "the creditors" have standing in this lawsuit;

b. Whether the constitutional issues raised are properly before this court; and

c. Whether Petitioner's Writ of Certiorari presents issues which would justify granting Petitioner's Writ of Certiorari.

Respondents conveniently ignore the issues raised and addressed from Petitioner's Writ and derive their own.

III.
STOCKLER & THE CREDITORS OF MTMS DO HAVE STANDING

The Creditor's of MTMS's claim against the Respondents herein is independent of MTMS's claim and does not and would not belong in MTMS's plan of reorganization. Additionally, in Judge LaPlata's "Order Vacating Attorney Fee Award and Remanding Action to Bankruptcy Court", Judge LaPlata held that the Respondents herein have a duty to the creditors of MTMS separate and distinct from their duties to the trustee.[4]

[4] Specifically, Judge LaPlata stated in his opinion of September 16, 1991 that: "...the Bankruptcy Trustee has a general fiduciary duty to all parties in interest in the bankruptcy case. This duty extends to the shareholders and the creditors. [See, Commodity Futures Trading Commission v Weintraub, 105 S. Ct. 1986 (1985)]...[I]n the bankruptcy arena, counsel for the trustee is a fiduciary of the estate [See, In Re:

Accordingly, Stockler and the creditors of MTMS do have standing to file this Writ of Certiorari.

IV.
THE CONSTITUTIONAL ISSUES RAISED ARE PROPERLY BEFORE THIS COURT

In regards to Respondents assertions of omissions from Petitioner's Writ in relation to constitutional issues, this is erroneous. The Court of Appeals unilaterally consolidated two separately filed and independent appeals, being the creditors claim against the Respondents and MTMS's claim against the Respondents. The Court of Appeals Opinion merging both appeals

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Consupak, Inc., 87 B.R. 529 (Bkrtcy. N.D. Ill. 1988]..." The facts establish that the creditors of MTMS, as a matter of law, had their own attorney and their own standing to appeal, as a matter of right, the trial court's dismissal of the creditors complaint. (R.54) Specifically, even if arguendo the trial court rules that MTMS and Kirkland had notice and knowledge of the facts of malpractice, that should have been included in MTMS's plan of reorganization, this did not dispose of the creditors of MTMS claim because the creditors nor the creditor's committee had any knowledge of either MTMS's chapter 11 disclosure for reorganization of the malpractice and wrongful actions of defendants. (R. 1)

together denied the creditors a right to appeal (a denial of due process and equal protection of the law).[5] As detailed in Petitioner's Writ (Issue II, page 30), due process of law mandates that creditors to a bankruptcy proceedings are entitled to representation by an attorney of their own on appeal. Tis issue was addressed and ignored with the Court of Appeals. After the trial court's granting of summary judgment, Stockler, as a creditor, on behalf of the creditors and the attorney for the

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[5] The Fifth Amendment to the U.S. Constitution states "No person shall be...deprived of life, liberty or property without due process of law." The Court of Appeals denied the Creditors due process and equal protection of the law by leaving the Creditors of MTMS without a remedy, without any representation, or an appeal.

See Bloom v State of Ill., 391 U.S. 194, 88 S. Ct. 1477, 20 L.Ed.2d 522 (Ill. 1968); Galvan v Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (Cal.1954). Mathews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (Va. 1976); Orloff v. Cleland, 708 F.2d 372 (C.A. Cal. 1983). Armstrong v Manzo, 380 U.S. 545, 552; 85 S. Ct. 1187; 914 L.Ed.2d. 62 (1965); Kanisley v Monroe, 539 F. Supp. 849 (1982); The standard for determining whether a person has been afforded procedural due process is whether he has been treated with fundamental fairness in light of the toral circumstances. Davis v Ann Arbor Public Schools, 313 F.Supp. 1217 (1870).

creditors in this matter, filed notices, specified the parties, specified the issues, filed the creditors appeal with designation of counsel of record, and paid all fees pursuant to the Federal Rules of Appellate Procedure.

MTMS and Kirkland (Co-plaintiffs) filed their own appeal through their own counsel. The creditors are entitled to representation on appeal by their own attorney, Stockler. The creditors briefs as well as their own oral argument should have been treated separately by the Court of Appeals to entitle the creditors equal protection and due process of law. The Court of Appeals precluded the creditors from any representation, ignored creditor's brief and ignored the creditors as if they didn't exist, when it is the creditors which suffered several million dollars of damages due to Respondent's malpractice.

V.
PETITIONER'S WRIT OF CERTIORARI PRESENTS ISSUES THAT JUSTIFY GRANTING PETITIONER'S WRIT

Respondents third allegation is that the creditor's Petition does not present issues which would justify a Writ of Certiorari. This is without merit.

First, the creditors of MTMS are seeking to have their legal malpractice claim heard against Respondents herein. (R.1) The Court of Appeal's action of unilaterally consolidating two separate appeals resulted in the denial of allowing the creditors of MTMS the opportunity to appeal, or maintain a malpractice claim against the attorneys for the trustees for MTMS. Respondents duty to the creditors of MTMS are separate and distinct from their attorneys duties to the trustee and that duty was violated by never notifying the creditors nor the creditors committee of the

conflict of interest between Bohl and Comerica bank as well as failing to advise Bohl of his obligation as trustee as was found by Bankruptcy Judge Steven W. Rhodes as detailed in Ptitioners Writ (page 13 footnote 1).

The Court of Appeals actions has resulted in the denial of allowing the creditors of MTMS the opportunity to appeal. A Notice of Taking Appeal was filed by Stockler, attorney for all creditors of MTMS other than Otis Kirkland. (R.54) MTMS and Otis Kirkland by and through their attorney, Kenneth M. Graham, filed their own notice of taking appeal. Graham never represented the creditors or Stockler at any time. Additionally, Graham was advised by Stockler both verbally and in writing that Graham does not represent the creditors of MTMS or Stockler. It was obvious that Kirkland knew of the conflict between Bohl and Comerica as

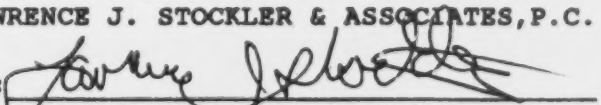
clearly indicated by his October 6, 1988 letter to the bankruptcy court. However, this does not mean and in fact does not mean that Stockler nor any of the creditors of MTMS knew of the conflict between Bohl and Comerica. Appeal No. 91-2260 was the appeal pertaining to the creditors of MTMS who had no knowledge of the conflict between Bohl and Comerica until the hearing before Judge Steven W. Rhodes on August 14, 1990. Appeal No. 91-2261 consisted of MTMS and Otis Kirkland. A joinder of both appeals by the Court of Appeals was not practical since that court denied the creditors of MTMS the opportunity to appeal the lower court's opinion. Accordingly, respondents assertions that this court should deny petitioner's Writ of Certiorari is without merit.

RELIEF REQUESTED

As indicated in Petitioner's Writ of Certiorari, the relief sought should be

granted by this Honorable Court and this matter should be ruled upon by this court in holding that the unsecured creditors pursuant to due process of law, are entitled to representation by their own attorney on their own appeal as well as maintain a malpractice claim against the attorneys for the trustee even when there are no provisions provided for in the plan of reorganization. In the alternative, this matter should be remanded to the United District Court for the Eastern District of Michigan to reinstate Petitioner's complaint and have the trier of fact rule on questions of fact.

Respectfully submitted,
LAWRENCE J. STOCKLER & ASSOCIATES,P.C.

BY: 

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APPENDIX A

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April 15, 1992

VIA FACSIMILE 569-0631

Lawrence J. Stockler, Esq.
15565 Northland Dr. Ste. 500
Southfield, Michigan 48075

Re: Micro-Time Management Systems, Inc.
v Allard & Fish, P.C., et al
Case No: 91-2261 District Court
Case No: 91-CV 60025

Dear Mr. Stockler:

You have asked me to clarify who my law firm represents in the appeal of Micro-Time vs Allard & Fish, P.C.

We represent Micro-Time Management Systems, Inc. and Otis Kirkland, only.

Very truly yours,

ROY, SHECTER & VOCHT, P.C.

/s/

Lynn H. Shecter

LHS/rp

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

In the matter of:

DATE: 18 MAR 1988

Micro-Time Management
Systems, Inc.

Case No. 88-01181-R

Debtor

_____/

ORDER APPOINTING UNSECURED
CREDITORS' COMMITTEE

At a session of said Court, held in the United States Courthouse, in the City of Detroit, Michigan, on March 16, 1988

PRESENT: HONORABLE Steven W. Rhodes
U.S. Bankruptcy Judge

The following unsecured creditors having consented to serve as members of the unsecured creditors' committee:

Chairperson
Roaring Spring Blank Book Company
David M. Riccitelli, VP Director of Administration
740 Spang Street
Roaring Spring, PA 16673
(814) 224-5141

Toronto Business Equipment
Joseph Toronto
1159 W. Broad Street
Columbus, Ohio 43222
(614) 272-5500

Esselte Pendaflex Corporation
John Cafiero
71 Clinton Road
Garden City, NY 11530
(516) 741-3200

Stockler & Herbach, P.C.
Lawrence J. Stockler
500 Northland Towers East
15565 Northland Drive
Southfield, MI 48075
(313) 7700

NOW THEREFORE, pursuant to Section 1102 of the Bankruptcy Code,

IT IS HEREBY ORDERED that they be, and hereby are appointed members of the unsecured creditors' committee in the above entitled case.

_____ /S/_____
U.S. Bankruptcy Judge